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Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-405

NATIONAL COMMISSION ON EGG NUTRITION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF OF ASSOCIATION OF NATIONAL ADVERTISERS, INC., AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

For the reasons hereinafter stated, the Association of National Advertisers, Inc., *amicus curiae,* respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit in this case.

INTEREST OF AMICUS CURIAE.

The *amicus curiae* is an association of enterprises which utilize the advertising media for purposes of bringing information about their products and services to the attention of consumers and the public. The essence of this case is the question whether a governmental authority may freely censor such communications because of their commercial content despite the First Amendment's guarantees of freedom of speech and the press. The case also raises important questions as to the proper construction of provisions of the Federal Trade Commission Act that are of necessity applicable to the *amicus curiae* and its members. It is plain, therefore, that the decision by this Court in this case will have significant effects on the *amicus curiae* and each of its members.

CONSENT OF THE PARTIES.

Both the petitioner and respondent have granted permission for this *amicus curiae* brief to be filed and the letters of permission are filed in the office of the Clerk.

QUESTIONS PRESENTED.

I. Is petitioner deprived of its First and Fifth Amendment rights by being subjected without a plenary adversary judicial hearing to a prior restraint on its expression of opinion about a controversial issue of fact on a subject of public interest?

II. May the Federal Trade Commission secure an injunction against petitioner's expression of opinion on a controversial subject simply because the statement was made in a commercial context and the Commission believes the petitioner's statement to be false and misleading, in the absence of an adversary hearing on the merits in the Commission or before any court?

III. Is not the Federal Trade Commission, in seeking an injunction under § 13(a) of the Federal Trade Commission Act against petitioner's freedom of expression, required to satisfy the procedural requirements of the First Amendment and to establish to the satisfaction of a court of equity the right to such relief?

REASONS FOR GRANTING THE WRIT.

The issues presented by this case are of widespread importance for the administration of the Federal Trade Commission Act. Two kinds of questions are intertwined. Both call for review by this Court. The first relates to the substantive rights of advertisers under the First Amendment to speak their minds on controversial issues of public interest relevant to their products. The second relates to the procedural rights of advertisers necessary to protect their First Amendment rights against invasion by the Federal Trade Commission. For any First Amendment rights that advertisers may have will necessarily be rendered nugatory by the provisions of § 13(a) as interpreted by the Court of Appeals below. Moreover, the decision of the Court of Appeals is in conflict with the opinions and judgments of this Court that define the substantive and procedural rights protected by the First and Fifth Amendments to the Constitution on issues that do and will recur frequently in the administration of the Federal Trade Commission Act.

I.

THIS CASE PRESENTS IMPORTANT ISSUES OF FREEDOM OF SPEECH THAT ARE NOW PENDING BEFORE THIS COURT, AWAITING ORAL ARGUMENT AND DECISION IN THE CASE OF VIRGINIA STATE BOARD OF PHARMACY vs. VIRGINIA CITIZENS CONSUMER COUNCIL, NO. 74-895.

The decision below, which concerned the scope of freedom of speech expressed in a "commercial" context, was rendered prior to this Court's decision in *Bigelow* v. *Virginia*, ... U. S. ..... (1975), which was decided on the same day that the Court of Appeals below denied the petitioner's motion for rehearing.

The consequence is that the Seventh Circuit decision was made by the Court of Appeals under the lingering misapprehension that an expansive reading of the doctrine of *Valentine* v. *Chrestenson*, 316 U. S. 52 (1942), was controlling. Now that this Court, in *Bigelow*, has imposed serious restrictions on the scope of the *Valentine* decision, the questions arise, in what circumstances, form, or manner may government inhibit freedom of oral and written expression simply because it is pronounced in a "commercial" context. That question is presented in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, No. 74-895, pending decision in this Court. (We have filed a brief *amicus curiae* in that case.)

In the instant case, the same question arises, except that the speech involved here is a statement of position on an issue that is hotly contested among scientists and the public in general. The meaning that lower courts will be obliged to give to *Bigelow* is fundamentally involved both in *Virginia State Board of Pharmacy* and this case. Since the Court is already committed to undertake explication of the issue in the *State Board of Pharmacy* case, it should do so here as well.

II.

THE COURT BELOW DISPOSED OF SERIOUS FIRST AMENDMENT ISSUES, RAISED BY FEDERAL TRADE COMMISSION CENSORSHIP, IN A MANNER THAT IS SQUARELY IN CONFLICT WITH THE DECISIONS AND JUDGMENTS OF THIS COURT.

The issue in this case is raised by the fact that the Court of Appeals for the Seventh Circuit has assumed that petitioner could be prevented from revealing to the public its views in a controversy that is widely debated both in scientific media and general publications simply because the petitioner's views support the economic interests of its membership. Not only does the court below justify prior restraint of speech of the petitioner, but

it does so on the ground that petitioner is not entitled to a prior hearing even on the issue of truthfulness either before the F. T. C. or the federal court. Thus, the error of prior restraint is compounded by the error of denial of appropriate process.

The question is focused by the fact that none would dispute the right of Drs. Marmot, Friedman and Rosenman to make a statement of the same kind as that made by petitioner. See Time Magazine, 18 Aug. 1975, pp. 54-55. But, because the petitioner has an economic interest in the outcome of the controversy, it is thought by the lower court that petitioner has lost the protections otherwise available under the First and Fifth Amendments of the Constitution. We submit that such a conclusion calls for review by this Court to ascertain whether it is consistent with the decisions that this Court has rendered in the area of protection of freedom of speech.

A. The Decision Below Is in Direct Conflict with This Court's Decision in Blount v. Rizzi, 400 U. S. 410 (1971).

The court below construed § 13(a) of the Federal Trade Commission Act to mean that where the F. T. C. has "reasonable cause" to believe that petitioner's speech was in violation of § 12 of the Act, an equity court is bound to issue an injunction against petitioner's right to express its views. It was exactly this interpretation of 39 U. S. C. §§ 4006 and 4007 that caused this Court to hold those federal statutes unconstitutional. *Blount* v. *Rizzi*, 400 U. S. 410 (1971). Indeed, this case is a fortiori, in light of the fact that in *Rizzi*, under § 4006, "the Department holds a trial-type hearing at which a full record is transcribed. . . . No § 4006 order may issue against the defendant until completion of the administrative hearing." 400 U. S. at 412-13. Here, there was not even an administrative hearing requirement. The procedure here was rather like that under § 4007, which authorized "the Postmaster General . . . upon a showing of probable cause to believe the statute is being violated, [to secure]

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a temporary restraining order and preliminary injunction." *Id.* at 414.

The standards for governmental censorship were cogently and concisely stated in *Rizzi*, 400 U. S. at 417:

> The procedure established by § 4006 and the implementing regulations omit those "sensitive tools" essential to satisfy requirements of the First Amendment. The three-judge courts correctly held in these cases that our decision in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), compels this conclusion. We there considered the constitutionality of a motion picture censorship procedure administered by a State Board of Censors. We held that to avoid constitutional infirmity a scheme of administrative censorship must: *place the burdens of initiating judicial* review *and of proving that the material is unprotected expression on the censor;* require "prompt judicial review"—a final judicial determination on the merits within a specified, brief period —to prevent the administrative decision of the censor from achieving an effect of finality; and limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution any restraint imposed in advance of the final judicial determination. 380 U. S. at 58-60. [Emphasis added.]

This Court went on to hold that the full-blown hearing before the administrative agency did not satisfy the First Amendment's demands in this area. A fortiori, this is true here where there has been no full-blown adversary-type hearings on the question of the propriety of the censorship.

This Court then went on to hold that the judicial process under 39 U. S. C. § 4007, which parallels that under 15 U. S. C. § 13(a) here, did not satisfy the requirements of the First Amendment. The Court there said, 400 U. S. at 420:

> Second, the district court is required to grant the relief sought by the Postmaster General upon a showing merely of "probable cause" to believe § 4006 is being violated. We agree with the three-judge court in Book Bin that to satisfy the demand of the First Amendment "it is vital that prompt judicial review on the issue of obscenity—

> rather than merely probable cause—be assured on the Government's initiative before the severe restrictions in §§ 4006, 4007, are invoked." 306 F. Supp., at 1028.

And the Court noted 400 U. S. at 421-22, a further deficiency that is equally applicable here:

> The appellees here not only were not afforded "prompt judicial review" but they "can only get full judicial review on the question of obscenity—by which the Postmaster would be actually bound—after lengthy administrative proceedings, and then only by [their] own initiative. During the interim, the prolonged threat of an adverse administrat[ive] decision in § 4006 or the reality of a sweeping § 4007 order, will have a severe restriction on the exercise of [appellees'] First Amendment rights—all without a *final* judicial determination of obscenity." 306 F. Supp., at 1028.

In light of the square conflict between the decision of the court below and the decision by this Court in *Rizzi*, certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit.

B. The Government May Not, Under Decisions of This Court, Either Forbid the Expression of Opinion or Compel the Expression of Opinion. The Decision of the Court Below Authorizes Both and Is Inconsistent with This Court's Decisions.

The Court of Appeals in this case not only granted the F. T. C.'s injunction telling the petitioner what opinions it could not express: at the same time it imposed a requirement on the petitioner as to what it was to say, if it were to say anything, on the controverted issue.

This Court has consistently and persistently forbidden government in this country to compel anyone to utter ideas, observations, or opinions that were not of his own choosing. See, *e.g.*, *Epperson* v. *Arkansas*, 393 U. S. 97 (1968); *Miami Herald* v. *Tornillo*, 418 U. S. 241 (1974); *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974). The decision below is incon-

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sistent with the doctrines established by this Court in these opinions and many others.

Moreover, the history of this Court's interpretation of the First Amendment is replete with judgments forbidding censorship of private communications, unless the communication itself is proved by appropriate procedures to be properly deemed illegal and constitutionally unprotected, as in the obscenity cases, or that the communication is such as to incite or effect illegal actions other than the communication itself. Neither untruthfulness, see, *e.g., New York Times* v. *Sullivan,* 376 U. S. 254 (1964), nor distastefulness, see, *e.g., Cohen* v. *California,* 403 U. S. 15 (1971); *Rosenfeld* v. *New Jersey,* 408 U. S. 901 (1972), nor inconvenience, see, *e.g., Organization for a Better Austin* v. *O'Keefe,* 402 U. S. 415 (1971), of the speech is adequate warrant for governmental suppression of opinion. In the libel cases, for example, this Court has held that a finding of the false content of the publication cannot strip the First Amendment protections of the publisher. *New York Times Co.* v. *Sullivan, supra,* 376 U. S. at 272. Rather, the inquiry must focus on the conduct of the publisher. Recovery can be had only when it is proved "that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity." *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 153 (1967). See, also, *Beckley Newspapers Corp.* v. *Hanks,* 389 U. S. 81 (1967). In this case, the FTC contends that alleged falsity alone is enough not only for a finding of illegality, but to compel a court of equity to issue a prior restraint against petitioner's speech.

Again, the decision of the court below is inconsistent with these principles long established by the decisions of this Court. Because of the inconsistency between the decision of the court below and these decisions by this Court, certiorari should issue in this case.

III.

THE STATUTORY INTERPRETATION OF § 13(a) OF THE FEDERAL TRADE COMMISSION ACT BY THE COURT BELOW IS INCONSISTENT WITH THE LEGISLATIVE WILL AND RENDERS THE STATUTE UNCONSTITUTIONAL.

Section 13(a) of the Federal Trade Commission Act, 15 U. S. C. § 53(a), provides that:

> Whenever the Commission has reason to believe—
>
> (1) that any person . . . is about to engage in . . . the dissemination or the causing of the dissemination of any advertising in violation of Section 12 of this title, and
>
> (2) that the enjoining thereof . . . would be to the interest of the public, the Commission . . . may bring suit . . . to enjoin the dissemination . . . of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. . . .

The Court of Appeals for the Seventh Circuit has held in this case that under this language the federal court from which the injunction is sought need only find that the F. T. C. had reasonable cause to believe that the alleged violation would take place. It rejected the notion that the F. T. C. had even the burden to show that the greater equities were on its side, no less that irreparable harm would result from the failure to grant the equitable relief sought.

A. The Seventh Circuit Construction Is Inconsistent with the Construction Given § 13(a) by Other Federal Courts.

The court in *Federal Trade Commission* v. *National Health Aids,* 108 F. Supp, 340, 346 (D. Md. 1952), read the statute more in keeping with the general requirements of due process and legislative intent. It said:

> [It] was hardly the intention of Congress to require a district court in the exercise of the extraordinary remedy of injunction to proceed affirmatively merely on the basis of

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> the reasonable belief of the administrative agency. Very important rights may be affected by the issuance of an injunction. . . . action should be withheld unless the facts fairly require affirmative relief in the public interest. . . . The reasonable belief of the Commission is sufficient to warrant its application for the injunction, but the actions of the Court should be based on the general consideration that properly apply in the issuance of preliminary injunctions.

Obviously this is a higher standard of proof than the Seventh Circuit would require, one more in keeping with the concept of injunctions as extraordinary remedies and, as will be shown, with the notions of Congressional purpose. It is, even so, short of the requirements that must be met when the injunction sought is a prior restraint on speech. *Blount* v. *Rizzi, supra.*

The case of *Federal Trade Commission* v. *Simeon Management Corp.*, 391 F. Supp. 697, 700 (N. D. Cal. 1975), aligned itself with the *National Health Aids* standard rather than that of the Seventh Circuit:

> Reasonable belief of a violation is enough to justify the FTC seeking a preliminary injunction, but in evaluating the motion for preliminary injunction, the District Court must look to the FTC's reasonable cause to believe that a violation has taken place, and must also as a separate factor weigh the equities in favor of granting or denying the preliminary injunction.

B. The Seventh Circuit Construction Is Inconsistent with the Expressed Intent of the Congress.

In 1973, Congress added § 13(b) to the Federal Trade Commission Act, 15 U. S. C. § 53(b). In that section it used language expressive of the construction given by the *National Health Aids* case. Section 13(b) provides:

> (b) Whenever the Commission has reason to believe—
>
> (1) that any person . . . is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

> (2) that the enjoining thereof . . . would be in the interest of the public—
>
> The Commission . . . may bring suit . . . to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest . . . a temporary restraining order or preliminary injunction may be granted. . . .

The Seventh Circuit read the difference in the language of the two paragraphs to justify the adoption of a lower standard of proof for § 13(a) actions than for § 13(b) actions. This rejected the fact that, in writing § 13(b), Congress assumed that it was codifying the law as established by § 13(a) and the *National Health Aids* case. See *Joint Statement of the Committee on Conference*, ¶ 16, H. R. Rep. No. 93-624, 93d Cong., 1st Sess. 31 (1973). This construction also resulted in the anomalous interpretation that a lower standard of proof is required for an injunction against publication of speech, which is all that § 13(a) is concerned with, than for injunctions against substantive violations of the Federal Trade Commission Act, which is the concern of § 13(b).

C. The Seventh Circuit Construction Clearly Raises the Issue of First Amendment Invalidity of the Statute.

Because § 13(a) affords a procedure for the issuance of a prior restraint against speech, and because—under the Seventh Circuit's interpretation—there is no requirement of a trial-type hearing on the issues of fact, nor of the use of standards generally applied to the issuance of injunctions, the construction given by the Seventh Circuit should be rejected. Whatever construction of the statute may be chosen raises questions about the constitutionality of the prior restraint. And the statute, under any construction, contains no standards for the imposition of censorship, whether the statute imposes prior restraint or punitive sanctions. The construction chosen by the Seventh Circuit clearly

suggests the unconstitutionality of the statute, while the alternative interpretations may be less vulnerable to constitutional attack. See *Blount* v. *Rizzi, supra; New York Times Co.* v. *Sullivan, supra; Curtis Publishing Co.* v. *Butts, supra; Beckley Newspapers Corp.* v. *Hanks, supra.* Under these circumstances, this Court has clearly imposed a rule that would choose that interpretation of a law which does not create serious doubts of the statute's constitutionality. As the Court stated in *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932):

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Accord, e.g., United States v. *Thirty-Seven Photographs,* 402 U. S. 363 (1971); *Watts* v. *United States,* 394 U. S. 705, 707 (1969); *Schneider* v. *Smith,* 390 U. S. 17, 26 (1969); *United States* v. *Rumely,* 345 U. S. 41, 45 (1953).

Because the court below construed an important statute in a manner that puts its constitutionality in serious question; because the court below construed an important statute in a manner inconsistent with the clear legislative intent; and because the court below construed an important statute in a manner inconsistent with that of other federal courts passing on the question, this Court should grant certiorari to review the judgment below.

CONCLUSION.

For the reasons herein stated, the *amicus curiae* urges that this Court grant the petition for certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

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